



LUMMI INDIAN BUSINESS COUNCIL

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DEPARTMENT LNR DIRECT NO. _____

March 10, 2008

Mr. Andrew Maron
Alternate SEPA Official
Port of Bellingham
P.O. Box 1677
1801 Roeder Avenue
Bellingham, WA 98227-1677

**SUBJECT: Lummi Nation Comments on the January 9, 2008 New Whatcom
Redevelopment Project Draft Environmental Impact Statement**

Dear Mr. Maron,

The purpose of this letter is to provide comments by the Lummi Natural Resources Department on the Draft Environmental Impact Statement (DEIS) for the proposed New Whatcom Redevelopment Project. The Lummi Cultural Resources Department may be submitting comments on this document under a separate cover.

1. The DEIS should also address National Environmental Policy Act (NEPA) requirements. Writing the DEIS in a manner that addresses both State Environmental Policy Act (SEPA) and NEPA requirements would ensure that the required federal permitting for the proposed clean up actions would be more stream-lined. This combined approach would better achieve Bellingham Bay Pilot Goal 6 (i.e., *Implement actions that are more expedient and more cost-effective, through approaches that achieve multiple objectives*). As written, the DEIS does not comply with NEPA both because cumulative effects and environmental justice issues associated with the considered alternatives are not evaluated and because the DEIS does not appropriately evaluate the proposed conversion of the ASB to a marina.

Federal impact assessments specifically require treatment of cumulative effects during EIS procedures: "Cumulative impacts result when the effects of an action are added to or interact with other effects in a particular place and within a particular time. It is the combination of these effects, and any resulting environmental degradation, that should be the focus of cumulative impact analysis. While impacts can be differentiated by direct, indirect, and cumulative, the concept of cumulative impacts takes into account all disturbances, since cumulative impacts result in the compounding of the effect of all actions over time. Thus, the cumulative impacts of an action can be viewed as the total effects on a resource, ecosystem, or human community of that action and all other activities affecting that resource, no matter what entity (federal, non-federal or private) is taking the actions." (EPA 315-R-99).

In addition, Executive Order 12898 of February 11, 1994 requires federal agencies to achieve environmental justice by addressing "disproportionately high and adverse human health and environmental effects on minority and low-income populations." The impacts of the project, both negative and positive, on minority and low-income populations must be analyzed. Environmental Justice issues include potential impacts on the physical and natural environment as well as social, cultural, and economic effects of the project. Based on the 2000 Census, the Lummi tribal members comprise the largest low income, minority population in the area and the physical, natural, social, cultural, and economic impacts of each of the proposed alternatives on the Lummi people need to be specifically addressed.

The DEIS should be revised to comply with NEPA and specifically address both cumulative effects and environmental justice issues for each alternative.

2. The conversion of the Aerated Stabilization Basin (ASB) to a marina is an action that could significantly affect the quality of the human environment and should not be considered as part of the No Action alternative. By assuming that the ASB will be converted to a marina regardless of what else happens with the project area, the Port provides an inadequate analysis. The proposed ASB conversion should be evaluated as part of an alternative action, not part of the No Action alternative, because:
 - It will have an environmental impact;
 - It will result in adverse impacts which cannot be avoided with the proposed implementation;
 - The proposed conversion of the ASB should be compared to other alternative actions. For example, at a minimum the proposed ASB conversion should be compared to the alternative identified as Habitat Action No. 13 the Bellingham Bay Pilot Team. As described in Appendix A of the 2006 draft Supplemental Environmental Impact Statement (SEIS), Habitat Action No. 13 is the removal of the ASB from the water and establishment of intertidal and shallow subtidal habitat and marine buffers and/or eelgrass. This alternative would result in the single largest habitat gain (33 acres) of all of the actions identified by the Pilot Team. Habitat Action No. 13 is much more aligned with the Lummi Nation interests than the proposed ASB conversion and would therefore help the Port better address the cumulative effects of the proposed action, achieve environmental justice, and protect Lummi Nation treaty rights;
 - It will have both short and long-term effects; and
 - It is associated with irreversible and irretrievable commitments of resources.

The logic and level of analysis presented by the Port regarding the proposed conversion of the currently permitted ASB to a currently unpermitted marina defeats the purpose of NEPA and SEPA. The Port's presented logic is like stating that since an oil refinery is allowable in an area zoned for heavy impact industrial uses, constructing a new oil refinery could be considered as part of a No Action Alternative for a project to construct a nearby pier. The DEIS goes further to state that the probable significant impacts of the ASB conversion to a

marina are assumed to be fully analyzed in the DEIS (see for example Page 1-8 and 2-25) although this analysis is never presented.

3. The DEIS erroneously concludes that there will be no impacts to navigation associated with the alternatives that were evaluated and therefore no mitigation measures are needed. In fact, the increased boat traffic in Bellingham Bay from the addition of the marina will interfere with the navigation of tribal fishers and therefore our ability to exercise our treaty rights.

The DEIS does not adequately evaluate impacts of the proposed alternatives to tribal members and, without listening to Lummi Nation representatives, actually portrays all of the proposed alternatives as a benefit to tribal members. As described above, the DEIS presents a single-focused evaluation that results in a marina regardless of any other action without actually conducting an appropriate assessment of alternative uses of the ASB. All of the alternatives that were evaluated have impacts on Lummi Nation members. As examples:

- The proposed conversion of the ASB to a marina will preclude opportunities for tribal members to exercise our treaty right of taking fish at usual and accustomed grounds and stations (U&A). Although the ASB currently prevents the exercise of this treaty right in a portion of the U&A, restoring the ASB site pursuant to Condition "S" of Permit No. 071-OYB-2-004368 (the permit issued to Georgia Pacific Corporation to authorize the construction of the ASB under Section 404 of the Clean Water Act) could restore eelgrass beds, associated habitat, and Lummi Nation fishing grounds. It should be noted that this permit was issued in 1976 without regard to active treaty fishing activity that was taking place at this location, which the ASB displaced, and without any consultation with the Lummi Nation.
- Tribal members cannot physically deploy fishing nets or crab pots in an area that is covered by a marina or that has large volumes of vessel traffic (nor can they harvest shellfish in these areas due to contamination associated with marinas and associated shellfish bed closures).
- The additional vessel traffic associated with the proposed marina, boat launch ramp, and temporary moorage development will interfere with tribal fishing in Bellingham Bay and nearby areas.

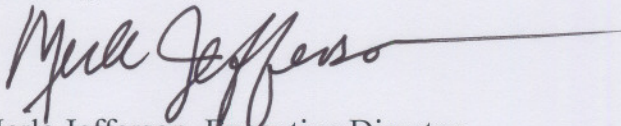
These treaty right impacts need to be addressed in consideration of the current law, including without limitation, *Northwest Sea Farms v. U.S. Army Corps of Engineers*, 931 F.Supp. 1515 (WD WA 1996) and *Muckleshoot Indian Tribe v. Hall*, 698 F.Supp. 1504 (WD WA 1988); the failure of the initial permit issuance to consult with the Lummi Nation; and the failure of the initial permit issued to Georgia Pacific Corporation to address treaty right impacts.

4. The fact sheet (Page ix) in the DEIS includes the following errors:
 - A Section 402 (NPDES) permit will be needed from Ecology both for the construction and for operation of the proposed plan (not the U.S. Army Corps of Engineers).
 - The U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency jointly administer section 404 of the Clean Water Act.

- The Corps of Engineers does not issue Section 401 Certifications. For the proposed project, the certification is issued either by the EPA or Ecology (in consultation with the Lummi Nation).
5. The description of the Bellingham Bay Demonstration Pilot Project in section 2.2.1 should include a statement that the collaborative Bellingham Bay Pilot Team concluded that Habitat Action No. 13, the removal of the ASB from the water and establishment of intertidal and shallow subtidal habitat and marine buffers and/or eelgrass, would result in the single largest habitat gain of all of the actions identified by the Pilot Team in Bellingham Bay.
 6. The list of comment letters from the EIS scoping period should be corrected to identify the Lummi Natural Resources Department, not the Lummi Nation, as the source of a comment letter submitted during the scoping period.

In summary, objectively addressing NEPA requirements including those for cumulative effects and environmental justice issues, removing the marina conversion from the No Action alternative, evaluating all appropriate alternatives including restoration of the ASB site, and addressing navigation and treaty rights impacts would help complete the analysis and support the selection of an appropriate preferred alternative.

Sincerely,



Merle Jefferson, Executive Director
Lummi Natural Resources Department

cc Henry Cagey, LIBC Chairman
 Elden Hillaire, Lummi Natural Resources Commission Chairman
 Richard Grout, Washington Department of Ecology
 Michelle Walker, Corps of Engineers
 Richard McAllister, Environmental Protection Agency
 Dan Pike, Mayor of Bellingham